NO. 34632-0

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FRANK EARL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable D. Gary Steiner

No. 03-1-05739-0

BRIEF OF RESPONDENT

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2. Has defendant failed to show that his confrontation clause claims present issues of manifest constitutional error when the record shows that they pertain to the admission of nontestimonial hearsay?

3. Does the Supreme Court's decision in State v. Pillatos resolve defendant's contention that the 2005 legislative fix to the SRA was improperly applied to his case?

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B. STATEMENT OF THE CASE.

1. Procedure

On December 9, 2003, the Pierce County Prosecutors Office charged appellant, FRANK CHESTER EARL ("defendant"), with two counts of rape of a child in the third degree, and two counts of incest in the first degree. CP 1-3. The two counts of rape of a child, and one count of incest (Counts I, II and III) pertained to "A.G." Id. The count of incest charged in Count IV pertained to "K.G." Id. The information was

amended to allege that an aggravating circumstance involving the abuse of trust was present in the commission of each of these crimes. CP 41-43.

The matter proceeded to trial before the Honorable D. Gary Steiner on May 31, 2005. RP 25. At the close of evidence, one of the counts of rape of a child was dismissed for insufficient evidence and not submitted to the jury. RP 728. After hearing the evidence, the jury found defendant guilty of all three remaining counts and returned special verdicts finding the presence of an aggravating circumstance on each count. CP 106-111.

The court did not impose sentence on Count I, finding that the Statute of limitations had run. CP 180-181. The court imposed a high end standard range sentence on each count of 102 months. CP 137-150. The court imposed an exceptional sentence in running the two counts consecutively. Id. The court entered findings of fact and conclusions of law regarding this sentence. CP 177-179.

Defendant filed a timely notice of appeal from entry of this judgment. CP 153-168.

2. Facts

Lora Gribben met the defendant while she was working in the Tacoma area as a cocktail waitress in the early 1980s. RP 98-100. They became romantically involved sometime around 1982, despite the fact that defendant was still married. RP 101-102. The relationship was unstable; they lived together off and on, with defendant returning to his wife then coming back to Ms. Gribben. RP 101-103. Defendant and Ms. Gribben

had two daughters together: K.G., born May 14, 1983, and A.G., born February 25, 1985. RP 105-106, 107. During her pregnancy with A.G., Ms. Gribben decided that she no longer wanted to live in Washington and was contemplating ending her relationship with defendant. RP 107. Ms. Gribben and defendant decided to try to work on their relationship; so when she moved to Ohio in November, 1984, the defendant came with her. RP 107-108, 124, 190. The change of location did not help the relationship, and Mr. Gribben and the defendant broke up three months after A.G. was born. RP 111-112, 124. Defendant came back into town for a week about three months after that, 1985, but the romantic aspect of the relationship was not renewed. RP 124-125, 139-140. After that defendant attempted to talk to Ms. Gribben on the phone a couple of times, but contact between them essentially ceased. RP 125.

In 1991, Ms. Gribben moved herself and her children[1] to Michigan. RP 125-126, 190-191. In 1995, upon the advice of her daughter's counselor, Ms. Gribben called defendant to re-establish contact. RP 126-127. K.G., in particular, was having some anger issues about her father not being a part of her life. RP 127. After that, defendant spoke to K.G. on the phone several times; A.G. was not interested in speaking to him because she didn't know him. RP 129. In 1995,

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[1] In addition to Kyrstal and A.G., Ms. Gibben had two sons from an earlier marriage, born in 1973 and 1975. RP 103.

defendant decided to come for a visit over the holidays and flew to Michigan for a two week visit. RP 129, 142-143, 200. Defendant wanted his daughters enrolled in the tribe and completed paperwork to have that happen. RP 128-133, 201-202. Ms. Gribben believed he had registered K.G. with the tribe before they left for Ohio in 1984; neither daughter received any funds prior to 1995. RP 201-203. The enrollment paperwork for the Puyallup tribe show signatures and processing dates of December, 1995, and January, 1996. RP 229-231. During defendant's visit, K.G. had an immediate positive reaction to her father. RP 142. A.G. was initially shy, then seemed to warm toward her father, but then pulled away with a negative impression of him. RP 142-144. A.G. did not like the way her father touched her. RP 207. When defendant left, K.G. cried, but A.G. just stood back and said good-by. RP 144. Over the next four years defendant had infrequent telephone contact with his daughters, mostly with K.G.. RP 144-145. One summer K.G. went by herself to visit defendant in Pierce County, Washington. RP 145-147, 207.

At a later time, it was proposed that both K.G. and A.G. take a trip to Washington to visit their father. RP 147-148. A.G. was reluctant to go but her sister talked her into going. RP 148-149. The plan was for the girls to stay for the summer; they left around the end of May- the first of June, 1999. RP 149-150, 174-175, 191, 208.

About a month after they left, A.G. called her mother, crying, begging to come home. RP 150 -151. Ms. Gribben told her daughter that,

financially, she just couldn't get her home immediately but to wait a week while she got the money together. RP 152. Ms. Gribben knew something was wrong but not any specifics. RP 152. Ms. Gribben managed to fly A.G. home before the week was out. RP 152. A.G. did not tell her mother what had happened but indicated that she never wanted to go back and that she was afraid for her sister. RP 152-153, 215. Ms. Gribben noticed that A.G. stayed very close to her after her return home and that she did not want any men around her; she would not let her brother give her a hug when she got home. RP 153.

In August /September of 1999, Ms. Gribben moved to North Carolina. RP 153, 157, 168, 191. While in North Carolina, she received a call from Jolene Lapointe, a woman who worked for the tribe, who asked her if she knew what had happened with A.G. in Washington. RP 154, 219-220, 236. The woman told Ms. Gribben that A.G. had been raped by her father. RP 154. When Ms. Gribben told her daughter who she had been speaking to on the phone, A.G. disclosed to her mother what had happened in Washington. RP 156. Ms. Gribben called the Davey County Children's Services; a deputy came out to take a statement from A.G.. RP 156-158. A second deputy came out later to ask some clarifying questions. RP 158-159. A.G. cooperated in answering questions up to a certain point. RP 159. When the deputy asked her to go into detail, she started crying and said "I can't do it, I can't do it." RP 159.

K.G. had decided to stay in Washington at the end of summer. RP 160. However one night, Ms. Gribben received a call from K.G. who informed her mother that she was going to be a grandmother. RP 160-161. K.G. told her mother that defendant's wife had thrown her out of the house when she found out about the pregnancy. RP 161. Ms. Gribben told her daughter to contact the woman who had called her about A.G. to see if she could help K.G. get home. RP 162. K.G. arrived home within the week. RP 162. She did not indicate who the father of the baby was, but did say that she had found a family to adopt the baby. RP 162.

About two weeks later, K.G. broke down crying and told her aunt - Ms. Gribben's sister- what had happened; she then told Ms. Gribben. RP 163. Ms. Gribben again contacted the authorities who sent a deputy out to take a statement from K.G.. RP 163-164.

Ms. Gribben decided to move her family back to Michigan around Christmas, 1999. RP 168, 192. K.G. gave birth to a girl, Winter Star, on May 16, 2000, two days after K.G.'s 17th birthday. RP 109-110, 169.

K.G. tried to raise her daughter, but after three months did not show much interest in doing so. RP 170. K.G. went into a depression and would sometimes wake up crying and screaming "No, No." RP 172. K.G. moved to South Carolina and tried to raise Winter Star. RP 181. Twice K.G. called her mother to come take Winter Star. RP 181. Ms. Gribben indicated that Children's Services intervened and placed Winter Star with Ms. Gribben while court proceedings were pending. RP 171. When

Winter Star was two, Ms. Gribben was given full guardianship, with K.G.'s agreement. RP 171. Except for about six months, Winter Star has lived with Ms. Gribben her entire life. RP 181.

Ms. Gribben testified that she took Winter Star and K.G. in to have a blood draw in Michigan. RP 177-178. She was not allowed into the room when the blood was drawn, but heard the baby scream, and K.G. say "ouch" from outside the room. RP 178. When they came out there was a prick mark on the baby's finger, and K.G. was wearing a bandage on her arm. RP 178. Ms. Gribben identified that the photograph attached to Exhibit 2A as depicting her daughter K.G. shown with her daughter Winter Star. RP 177. The photo depicted them as they appeared when they went for the blood draw. RP 178.

Ms. Gribben explained that at the time that K.G. was born, she informed the hospital that defendant was the father, but because he was not there, and they were not legally married, the hospital would not enter his name on the certificate. RP 195-196. Defendant was given paperwork to complete, have notarized and return, if he wanted to have his name on the certificate. RP 195. Apparently, he never did this. RP 195. Defendant was present for A.G.'s birth, so his name appears on her birth certificate. RP 197.

Rebecca McMahan is a nurse practitioner employed by the Davey Heath Department in Moxville, North Carolina. RP 262. Ms. McMahan saw K.G. twice in 1999. RP 264. The first visit was on October 19, 1999,

and K.G. came in for a pregnancy test. RP 265-267. K.G. became a prenatal care patient with the Health Department. RP 268. During this visit, K.G. told Ms. McMahan that her biological father was the father of the baby, and that it had been conceived in the living room of her father's home. RP 269-270. K.G. indicated that it was the result of nonconsensual sex. RP 270. Ms. McMahan testified that K.G. told her that her father had been drinking, that she asked him to stop and he refused. RP 270-271. Ms. McMahan calculated that K.G. was approximately ten weeks pregnant at that first visit; she estimated a delivery date around May 16, 2000. RP 271-272. As part of their prenatal treatment, the Health Department would want to know who was the father of the child, as that might impact whether there was support for mother, which could affect her emotional health. RP 269. After the visit for the pregnancy test, K.G. had four prenatal care visits at the Davey County Health Department. RP 275-276. Throughout these visits she maintained that her biological father was the father of her baby, and that it was a product of rape. RP 276-277. K.G.'s visits terminated when she moved to Michigan. RP 277.

A.G. testified that the defendant was her father but there had been very little contact with him as she grew up. RP 296. She saw him for the first time when she was eight when he came to Michigan at Christmas time. RP 296. The next time she saw him was when she was about 14 and she visited him in Washington, along with her sister K.G., in the summer of 1999. RP 298-300. She and K.G. stayed with her father and

his wife, Debbie. RP 301. There were two bedrooms; defendant and his wife were in one, and K.G. got the other; A.G. slept in the living room. RP 302. A.G. testified that the first day she arrived in Washington, her father tried to kiss her using his tongue, and that after that she tried to stay away from him after that. RP 304. A.G. told Debbie about the kiss, but she refused to believe it had happened. RP 305.

A.G. testified that one day she was left alone in the house with her father. RP 307. Defendant called her into the bedroom and told her to lie on the bed. RP 307-308. Defendant took off her clothes then penetrated her vagina with his penis, ignoring her pleas to stop. RP 308-309. Defendant told her not to say anything. RP 309. A.G. could tell that her father had been drinking. RP 310. Afterward, A.G. went into her sister's bedroom to cry. RP 309. When her sister came home, A.G. told her what had happened, but K.G. did not believe her. RP 310. While she was in Washington, she told her Uncle Junior- the defendant's brother- that defendant had touched her. RP 317. She also told Jessica, a half-sister who lived in Texas but was in Tacoma for the summer, what had happened. RP 305-307, 315. When she got home to North Carolina she told her cousin Niki what had happened. RP 318. Niki was the first person she told with full details. Id. A.G. has never been married. RP 324.

Jolene Lapointe testified that she used to be employed as a CPS worker for the Tribal Child Protective Services with the Puyallup Tribe handling complaints about abused and neglected children. RP 522-523. Any of her cases of abuse that were determined to be founded would go to tribal court. RP 525-526. There could be dependency proceedings or criminal proceedings, but she only handled the dependency aspect; she did not handle the criminal part. RP 526-527. Ms. Lapointe first received a report regarding defendant on August 10, 1999, from a Dorothy Meadman.[2] RP 531. The report concerned A.G. and K.G. RP 536. Ms. Lapointe determined that A.G. was no longer in Washington State, and that K.G. was no longer at defendant's house, but with nearby relatives. RP 536-538. Ms. Lapointe met with K.G. who indicated that she wanted to go back home to her mother. RP 238. Ms. Lapointe placed K.G. in emergency foster care until she could be flown home. RP 538. Ms. Lapointe turned the information she gathered over to Officer Johns of the Tribal Police. RP 552. She had no contact with the defendant; there was no need as both girls were out of state with their mother. RP 552-554. She did keep contact with the clinic where K.G. verified her pregnancy. RP 553.

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[2] This was the defendant's sister. RP 155, 532

Douglas Johns, an officer with the Puyallup tribal police, testified that in 1999 he was working as a detective when he received a case referral regarding A.G. from Jolene Lapointe, a CPS caseworker for the Puyallup Tribe. RP 369-373. Ms. Lapointe passed along information from a Dorothy Stedman that A.G. had been raped. RP 373-376. Officer Johns found out that A.G. was now in North Carolina, and contacted law enforcement back there to see if they would do a courtesy interview. RP 376. Officer Johns received a fax from a Detective Stephens relating what he had learned in his interview with A.G.. From that information, Officer Johns had a concern that the incident had occurred in an area outside of his jurisdiction. RP 377-378. He spoke with K.G. on October 1, 1999, and clarified that the home in question was outside of his jurisdiction. RP 385-386. He passed the information to Detective Randi Goetz of the Tacoma Police Department according to standard protocols. RP 377-378, 385-386. In November of 1999, Officer Johns assisted Detective Goetz in arresting defendant on tribal lands. RP 391-394.

Detective Randi Goetz of the Tacoma Police Department testified that she received the defendant's case on a referral from the Puyallup Tribal Police Department in October, 1999. RP 399-400. After receiving the report, she generated a Tacoma police number and contacted Jolene Lapointe with Tribal CPS. RP 400. Until the end of October, 1999, Detective Goetz was only aware of allegations involving A.G., having

received reports from interviews done by officers back in North Carolina. RP 400-402. On October 14th, Detective Goetz sent a letter to defendant asking him to contact her, but heard no response by the end of the month. RP 402. On November 11, 1999, Detective Goetz went out to arrest defendant, assisted by Officer Johns and another TPD officer. RP 402, 406-407. They located defendant, arrested him, and brought him back to the County-City Building in Tacoma. RP 407. After being advised of his Miranda rights, defendant wanted to know "who exactly was saying what." RP 409. Detective Goetz informed him that A.G. was saying that he had raped her. RP 409. Defendant responded that A.G. was "mentally disturbed." RP 409. Defendant acknowledged that A.G. was one of his four biological daughters, and that she was 14 years old. RP 410.

Detective Gene Miller of the Tacoma Police Department assisted in the collection of a blood sample from the defendant. RP 506, 510-511. On January 16, 2004, Detective Miller met defendant at the Tacoma General Hospital and watched his blood be drawn and put into purple topped vials. RP 511-512, 515. After the vials were labeled and secured, they were given to Detective Miller who took them back to the property room and checked them into evidence. RP 511-514. The blood never left his possession during this time. RP 513. Detective Miller testified that defendant failed to appear for his next court date scheduled after this blood

draw, which was February 4, 2004, and that a warrant issued for his arrest. RP 515-516. Detective Miller took several steps to alert law enforcement in the area regarding the outstanding warrant. RP 516-517. Defendant was arrested on the warrant on March 5, 2004. RP 517.

Dr. Marco Scarpetta, the laboratory director for Clean Screen[3] in Lancing, Michigan, testified that he oversees a lab which does paternity testing, including reviews of all protocols and all the tests. RP 452-454. He is also a custodian of the company's records. RP 454. Dr. Scarpetta testified that sometimes the company performs tests at the request of a private party, but that more commonly parties are referred to his company for paternity testing by a child support office. RP 455. He testified that the following procedures are used when blood is drawn at his companies sites: 1) they positively identify the parties; 2) blood is collected from each individual and sealed in a tube; 3) the relevant samples are sent by overnight shipping to the lab for testing. RP 455. He testified that positively identifying the parties is critical as the parties may be trying to affect the results a certain way. The employee will often take a thumb print or match them to their driver's license. It is part of their protocol to take a picture of the person giving the blood sample and that this

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[3] This company has been through two buy-outs; it was formerly know as both National Legal Labs and Life Code. RP 452.

photograph becomes part of their "chain of custody," which is a document setting forth the steps they took to ensure that they collected from the correct people. RP 456. All of the company's phlebotomists are trained in this procedure, which was established by the AABB[4], the accredited body for paternity testing. RP 457. Every other year this agency inspects the records to insure compliance with the protocols. RP 457.

Dr. Scarpetta explained the procedures for packing and shipping the blood samples. RP 457-459. Every package that is received by the lab is inspected for signs of tampering; any sample that does not have an intact double seal is rejected. RP 459-460.

Dr. Scarpetta identified Exhibit 2A as being a chain of custody form from his company's records. RP 464-465, 498. He indicated that this is a routine form that he relies upon in the normal course of his work and job, including when he testifies in court. RP 464. The form indicates: 1) whose blood was collected; 2) on what date; 3) who did the collection; 4) who entered the names into the data base at the lab. RP 465.

This form indicated that on January 9, 2001, a phlebotomist named Charlene McGinnis collected blood from a K.G., mother, and Winter Star Gribben, child, at the company's laboratory. RP 465. There was a picture of the mother and child and thumb prints from both; K.G. had also signed

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[4] It is referred to as both the ABB and the AABB in the report of proceedings. RP 457.

he bottom of the form. RP 465-466, 469. The exhibit indicated that the samples were then transferred to Linda Kisling who assigned a unique bar code to the mother and the child, and entered the demographic information into the computer. RP 466-467, 469, 471. The records show that the request for blood draw was initiated by the Jackson Family County Dependency Agency. RP 467. This was a courtesy blood draw, so the blood samples were not tested by the company, but shipped to the Pierce County Sheriff's Office on January 12, 2001, by Airborne Express. RP 466, 475-476. The blood sample was received by Detective Goetz, who checked it into the Sheriff's Office property room on January 17, 2001. RP 410-413, 486-487. The blood samples were later taken by a property officer to the State Patrol Crime Lab. RP 487. About three months later, the samples were returned from the crime lab to be stored in the property room. RP 489.

Jeremy Sanderson is employed at the Washington State Patrol Crime Laboratory as a forensic scientist specializing in DNA analysis. RP 578-581. Mr. Sanderson testified that he received three blood samples; from K.G., Winter Star, and defendant, contained in Exhibits 14 and 15, for analysis. RP 591, 593-611. After extracting DNA from the samples and comparing the results, he was unable to exclude defendant as being the biological father of K.G. RP 614-622. He testified that it is 36,000

times more likely to find these profiles if defendant were K.G.'s father, than you would by randomly selecting a person. RP 627. Similar tests were performed on Winter Star's blood sample. RP 628-634. The likelihood ratio for Winter Star was 640,000 to one. RP 634-635.

Barbara Richardson testified regarding the enrollment forms completed so that K.G. could become an enrolled member of the Puyallup Tribe. RP 670-675. K.G's forms were signed by defendant and came with a Washington State birth certificate listing "Frank Chester Earl" as the father. RP 674-683. The Tribe will request a paternity test if the tribal member parent is denying parentage. RP 683-684. No such requests were made with K.G.'s application for enrollment. RP 684.

Chester Edward Earl, the defendant's nephew, testified in the defense case. RP 711-712. He testified that during the summer of 1999, K.G. told him that she was going to get back at her father, because he was not present for most of her life. RP 713-714. He had been told by his mom that A.G. and K.G were the daughters of the defendant and his cousins. RP 720-721.

C. ARGUMENT.

1. DEFENDANT FAILED TO PRESERVE ANY HEARSAY CLAIMS IN THE TRIAL COURT AND DOES NOT PRESENT A CLAIM THAT MAY BE RAISED FOR THE FIRST TIME ON APPEAL; MOREOVER AS THE ADMISSION OF NONTESTIMONIAL HEARSAY DOES NOT IMPLICATE THE CONFRONTATION CLAUSE.

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), the Court held that an out-of-court testimonial statement may not be admitted against a criminal defendant unless the declarant testifies at trial or is unavailable, and the defendant had a prior opportunity to cross-examine the declarant. Crawford, 124 S. Ct. at 1374. The decision in Crawford was restricted to the use of testimonial hearsay, but "left for another day any effort to spell out a comprehensive definition of 'testimonial.'" Crawford, 124 S. Ct. at 1374. The Court, however, gave guidance on the issue by noting various formulations of the "core class" of testimonial statements at which the Confrontation Clause was directed. These include (1) "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;" (2) "extrajudicial statements. . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or

confessions;" and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 124 S. Ct. at 1364.

Recently, in Davis v. Washington, _____ U.S. ___, 126 S. Ct. 2266, 165 L.Ed.2d 224 (2006), and its consolidated case, Hammon v. Indiana, the Supreme Court provided further guidance with regard to the parameters of statements deemed "testimonial." First, in Davis, the Court held that the complainant's 911 telephone call was nontestimonial and, therefore, not subject to the Confrontation Clause of the Sixth Amendment. In upholding the admissibility of the 911 call, the Court stated:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 126 S. Ct. at 2273 -74. The Court reached a different conclusion in the second case, which also stemmed from a domestic dispute. At issue was Amy Hammon's statements to investigating police officers at her home after the police responded to a reported domestic disturbance. Id. at 2272. The Court found the characterization of these statements was

"much easier" to resolve because they "were not much different" from the statements in Crawford. Id. at 2278. The interrogation arose from "an investigation into possibly criminal past conduct"; "[t]here was no emergency in progress"; Hammon told the officers when they arrived that "things were fine"; when an officer eventually questioned Hammon a second time and elicited the challenged statements he was not seeking to determine "what is happening," but rather "what happened." Id.

In addition to providing further guidance on what constitutes a testimonial statement, the Court explained that it "must decide ... whether the Confrontation Clause applies only to testimonial hearsay." 126 S. Ct. at 2274. As noted above, this issue was raised but left undecided by the Court in Crawford. In Davis, the Court clarified that nontestimonial hearsay does not implicate the confrontation clause at all. Thus, any challenge to the admission of hearsay on the basis of the right to confront must assess whether the hearsay at issue is testimonial.

As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). A defendant may claim error for the first time on appeal only if it is a "manifest error affecting a constitutional right". RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)(citing State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988)); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992)). The rationale to limiting even potential constitutional errors is sound:

> [P]ermitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts.

McFarland, at 333 (citing Lynn, 67 Wn. App. at 344). The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest," allowing appellate review. State v. McFarland, 127 Wn.2d at 333. If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. McFarland, 127 Wn.2d at 333 (citing State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)).

For example, in McFarland, the appellate court declined to find any prejudice with respect to the warrantless arrest. The court held:

> "[I]t is not enough that the Defendant allege prejudice -- actual prejudice must appear in the record. In each case, because no motion to suppress was made, the record does not indicate whether the trial court would have granted the motion. Without an affirmative showing of actual prejudice, the asserted error is not "manifest" and thus is not reviewable under RAP 2.5(a)(3)."

McFarland, 127 Wn.2d at 334.

In State v. Smith, 155 Wn.2d 496, 120 P.3d 559 (2005), Smith was on trial for first degree driving while license suspended or revoked; at trial he objected to the admission of a letter from a DOL custodian of records on the basis of foundation. On appeal, he argued the letter should

have been excluded as hearsay. The Court of Appeals addressed this argument and held a DOL letter certifying information in DOL's database regarding an individual's driving status is a public record. See, State v. Smith, 122 Wn. App. 699, 704, 94 P.3d 1014 (2004) aff'd on other grounds, 155 Wn.2d 496, 1208 P.3d 559 (2005)(driving record is "'a classic example of a public record'" (quoting State v. Monson, 53 Wn. App. 854, 858, 771 P.2d 359 (1989))). The Supreme Court held that the lower appellate court should not have reached this issue because an objection to foundation does not preserve a hearsay issue for appeal. Smith, 155 Wn.2d at 501 n.4. The Court declined to address Smith's unidentified constitutional arguments. Smith, 155 Wn.2d at 501.

In this case, defendant claims that his right of confrontation was abridged by the admission of "testimonial hearsay" through business records containing written notations by two employees of Clean Screen, and by statements made by K.G. to a nurse at a county health department. The only objection to the business records was based on foundation or chain of custody. RP 445-452, 477-478, 498. There were no objections to the testimony of the nurse. RP 267-278. Defendant acknowledges that there was no objection made below on the basis of the right of confrontation, but asserts that this issue may be raised for the first time on appeal under RAP 2.5(a)(3). See, Brief of appellant at p. 13. Under Smith, these claims have not been properly preserved for review. Additionally, as will be discussed below, defendant fails to show that this

challenged evidence constitutes "testimonial" hearsay and, therefore, has failed to present a constitutional claim that may be raised for the first time on appeal.

a. Division II should follow the majority of the jurisdictions and the other two divisions of the Court of Appeals in holding that business records do not constitute testimonial hearsay.

In Crawford, the Court suggested in dictum that a business or official record would not be subject to its holding as this exception was well established in 1791. Crawford, 541 U.S. at 56. The federal circuit courts that have addressed this question since Crawford appear to be unanimous in holding that business records are not testimonial and are thus exempt from the limitations of the confrontation clause. See, e.g., United States v. Feliz, 467 F.3d 227, 233-234 (2nd Cir. 2006) ("a statement properly admitted under Fed. R. Evid. 803(6) cannot be testimonial because a business record is fundamentally inconsistent with what the Supreme Court has suggested comprise the defining characteristics of testimonial evidence"); United States v. Ellis, 460 F.3d 920, 924 (7th Cir. 2006) ("it is clear that statements embodied in a business record are nontestimonial"); United States v. Baker, 458 F.3d 513, 519 (6th Cir. 2006) (same); United States v. Hagege, 437 F.3d 943, 958 (9th Cir. 2006) (same); United States v. Rueda-Rivera, 396 F.3d 678, 680 (5th Cir. 2005) (same); United States v. Lee, 374 F.3d 637, 644 (8th Cir. 2004) (same).

Most state courts have likewise concluded that business records are, by definition, nontestimonial. See, e.g., Rollins v. State, 897 A.2d 821, 832-833 (Md. 2006); State v. Huu The Cao, 626 S.E.2d 301, 305 (N.C. App. 2006); State v. Norman, 125 P.3d 15 (Or. App. 2005); Commonwealth v. Verde, 827 N.E.2d 701, 705-706 (Mass. 2005); People v. Walters, 148 P.3d 331, 338 (Colo. App. 2006); State v. Dedman, 102 P.3d 628, 635 (N.M. 2004); but see State v. Crager, 844 N.E.2d 390, 398-99 (Ohio App. 2005) (refusing to adopt per se exclusion of all business records from Sixth Amendment scrutiny).

A majority of jurisdictions hold that laboratory reports and similar documents are nontestimonial business or public records. See, e.g., United States v. Bahena-Cardenas, 411 F.3d 1067 (9th Cir. 2005)(warrant of deportation is nontestimonial because it is a routine objective cataloging of an unambiguous factual matter); Perkins v. State, 897 So.2d 457, 462-465 (Ala. Crim. App.2004) (autopsy report admissible under business records exception); Smith v. State, Ala. Crim. App., 898 So.2d 907, 910-911 (2004) (autopsy report is business record and not testimonial but should not have been admitted without coroner's testimony because report contained opinion); People v. Johnson, 121 Cal. App. 4th 1409, 18 Cal.Rptr.3d 230 (2004)(laboratory reports routine and nontestimonial documents); People v. Hinojos-Mendoza, 140 P.3d 30, (Colo. App. 2005)(review granted August 14, 2006)(drug laboratory report is

nontestimonial); Commonwealth v. Verde, 827 N.E.2d 701 (2005) (laboratory report on weight of cocaine a business record); State v. Dedman, 136 N.M. 561, 102 P.3d 628 (2004)(blood alcohol content reports nontestimonial); Frazier v. State, 907 So.2d 985 (Miss.Ct.App.2005)(pen-packs nontestimonial); State v. Thackaberry, 194 Or. App. 511, 516, 95 P.3d 1142 (2004) (laboratory report of urinalysis was "analogous to--or arguably even the same as--a business or official record" (in dicta as court finds error not preserved)); State v. Cuero, 365 S.C. 366, 378, 618 S.E. 2d 890 (2005)(autopsy report nontestimonial).

A minority of jurisdictions treat as testimonial under Crawford various documents prepared at the behest of law enforcement. See, e.g., Johnson v. State, 929 So.2d 4 (Fla. App. 2005) (lab report prepared at state crime lab pursuant to police investigation testimonial); Bevin v. State, 922 So.2d 1046 (Fla. App. 2005)(affidavit concerning defendant's blood alcohol level testimonial); City of Las Vegas v. Walsh, 120 Nev. 392, 91 P.3d 591, modified, 100 P.3d 658 (Nev.2004)(nurse's affidavit regarding circumstances of blood draw testimonial).

Intermediate appellate and lower courts within New York and Texas appear to have taken contrary positions. People v. Meekness, 34 A.D. 3d 843, 828 NAY'S. 83 (2006)(private laboratory's DNA report a business record and nontestimonial); People v. Brown, 9 Misc.3d 420, 801 N.Y.S.2d 709 (2005)(DNA testing records nontestimonial); People v. Camahi, 8 Misc.3d 447, 797 N.Y.S.2d 870 (Crimp. Ct.2005)(breathalyzer

test results regular business records and nontestimonial); People v. Dario, 7 Misc.3d 729, 794 N.Y.S.2d 863 (2005) (autopsy reports nontestimonial business records); People v. Brown, 5 Misc.3d 440, 785 N.Y.S.2d 277 (2004)(statements in presentencing report nontestimonial); People v. Capellan, 6 Misc.3d 809, 791 N.Y.S.2d 315 (Crim. Ct.2004)(affidavit of motor vehicle records manager concerning defendant's driving record testimonial); People v. Hernandez, 7 Misc.3d 568, 794 N.Y.S.2d 788 (2005)(police officer's report on latent fingerprint test testimonial); People v. Rogers, 8 A.D.3d 888, 780 N.Y.S.2d 393 (2004)(report of private company that performed blood test testimonial); Moreno Denoso v. State, 156 S.W.3d 166 (Tex. App. 2005)(autopsy reports nontestimonial); Russeau v. State, 171 S.W.3d 871 (Tex. Crim. App.2005)(disciplinary report concerning defendant's misbehavior in prison testimonial).

In Florida, the admissibility of blood tests might depend on whether the blood was drawn for medical purposes or at the request of law enforcement. Compare, Baber v. State, 775 So.2d 258, 262 (Fla. 2000) (pre-Crawford case finding no confrontation clause violation where analysis of blood drawn for medical purposes later admitted at criminal trial), with Johnson v. State, 929 So. 2d at 8 (blood analysis done at state crime lab done to establish element of crime at trial is testimonial).

In Washington, both Division I and Division III have held that business records and evidence of the absence of a public record are nontestimonial. State v. N. M. K., 129 Wn. App. 155, 118 P.3d 368

(2005) review granted, State v. Kirkpatrick, 157 Wn.2d 1001, 136 P.3d 758 (2006). (Division I finding document certifying the absence of a public is nontestimonial); State v. Kronich, 131 Wn. App. 537, 546-547, 128 P.3d 119 (2006), review granted, 157 Wn.2d 1008 (2006)(Division III holding a DOL record custodian's certification regarding the status of defendant's driving privileges was nontestimonial business record).

The policy reason behind the majority rule is that the contents of these reports such as "[c]ertificates of chemical analysis are neither discretionary nor based on opinion; rather, they merely state the results of a well-recognized scientific test determining the composition and quantity of the substance." Thus, the court concluded, "we do not believe that the admission of these certificates of analysis implicate[s] 'the principal evil at which the Confrontation Clause was directed." ' Commonwealth v. Verde, supra, 444 Mass. at 284, 827 N.E.2d at 706 (quoting Crawford, supra, 541 U.S. at 50, 124 S. Ct. at 1354).

The Crawford decision examined the history of the right to confront ones accusers and held that the Sixth Amendment right must be interpreted keeping in mind the evils it was designed to prevent. The court declared that the principal evil it was trying to prevent was the "civil-law mode of criminal procedure and particularly its use of ex parte examinations as evidence against the accused." Crawford, 541 at 50. Inherent in the court's analysis is the assumption that the "testimonial

hearsay" at issue is evidence which, in fact, incriminates the defendant in the crime with which he is charged.

Looking at the business record challenged here, it is clear that the contents of the business record do not incriminate the defendant. Exhibit A. The records document actions which two employees of Clean Screen performed in the course of their employment. This business record indicated that on January 9, 2001, a phlebotomist named Charlene McGinnis collected blood from a K.G., mother, and Winter Star Gribben, child, at the company's laboratory. RP 465. There was a picture of the mother and child and thumb prints from both; K.G. had also signed the bottom of the form. RP 465-466, 469. The exhibit indicated that the samples were then transferred to Linda Kisling who assigned a unique bar code to the mother and the child, entered the demographic information into the computer. RP 466-467, 469, 471. The records show that the request for blood draw was initiated by the Jackson Family County Dependency Agency. RP 467. This was a courtesy blood draw, so the blood samples were not tested by the company, but shipped to the Pierce County Sheriff's Office on January 12, 2001, by Airborne Express. RP 466, 475-476. None of these actions incriminate defendant in the commission of the charged offense. The business had no stake in the outcome of any paternity test involving that blood. The employees were simply performing their duties and documenting the same according to protocols established by an accrediting agency and used by Clean Screen.

It is not the content of the business record that incriminates defendant, but the DNA content of the blood drawn when analyzed in conjunction with the DNA content of defendant's blood. DNA is not hearsay and therefore not subject to Crawford. The business record at issue here is the same type of business record as an autopsy or laboratory report and is properly characterized as nontestimonial. Defendant does not present a constitutional claim that may be raised for the first time on appeal.

b. As the record indicates, K.G.'s statements to nursing staff at a county health department were made for the purposes of medical diagnosis and treatment, and therefore were nontestimonial, defendant cannot show manifest constitutional error that can be raised for the first time on appeal.

A statement made out of court that is offered in court to prove the truth of the matter stated is inadmissible hearsay evidence unless it falls within one of the exceptions to the hearsay rule. ER 801. One exception to the hearsay rule allows evidence of a "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." ER 803(a)(4). This exception is available regardless of the availability of the declarant. ER 803(a). Statements made for the purpose of medical diagnosis and treatment have

been recognized as a firmly rooted hearsay exception by both the United States Supreme Court and the Washington Supreme Court. White v. Illinois, 502 U.S. 346, 355 n.8, 112 S. Ct. 736, 116 L.Ed.2d 848 (1992), State v. Woods, 143 Wn.2d 561, 595; 23 P.3d 1046 (2001).

Until recently, it was well established that the confrontation clause was not offended by the admission of a hearsay statement offered against a criminal defendant when that statement fell within one of the "firmly rooted" exceptions to the hearsay rule. Idaho v. Wright, 497 U.S. 805, 815, 110 S. Ct. 3139, 111 L.Ed.2d 638 (1990). In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court indicated that as far as "testimonial" hearsay was concerned, the confrontation clause could only be satisfied by a criminal defendant's opportunity to cross-examine the declarant. In the case now before the court, defendant argues that K.G's statements to nursing staff at the Davey County Health Department are "testimonial", so that Crawford compels a different analysis than that set forth in White and Wright.

Most courts considering statements made for medical treatment, in cases that have arisen in the assessment and treatment of sexual assault victims, have concluded that, "if an interview is done strictly for medical purposes, and not in anticipation of criminal proceedings, the statement would be considered nontestimonial. . . . [I]f a statement is made as part of an investigation by government officials the statement is generally considered testimonial." (Citations omitted.) State v. Blue, 717 N.W.2d

558, 563-564(N.D. 2006)(videotaped interview of child sex abuse victim by forensic examiner, taken one week after alleged assault, was testimonial when directed and witnessed by police detective); see also People v. Vigil, 127 P.3d 916, 926 (Colo. 2006) (With no police officer present, an objective witness in a child's position would not see the statements as testimonial because that "child would reasonably be interested in feeling better and would intend his statements to describe the source of his pain and his symptoms. In addition, an objectively reasonable seven-year-old child would expect that a doctor would use his statements to make him feel better and to formulate a medical diagnosis. He would not foresee the statements being used in a later trial."); In re C.T., 351 Ill. App. 3d 976, 992, 815 N.E.2d 789, 287 Ill. Dec. 145 (2004) (child victim's statements to a pediatrician describing the cause of symptoms or pain or the general character of the assault were not testimonial in nature); Commonwealth v. DeOliveira, 447 Mass. 56, 64, 849 N.E.2d 218 (2006) (child victim's statements "cannot persuasively be said to have been made in response to police interrogation" when police were present at hospital, but not for examination, and they had not "instructed the doctor on the manner in which his examination should proceed"); Foley v. State, 914 So. 2d 677, 685 (Miss. 2005)(child victim's statements to physicians not testimonial because they "were made as a part of neutral medical evaluations" and medical professionals did not contact and were not being used by police); State v. Moses, 129 Wn. App. 718,

730, 119 P.3d 906, (2005) review denied, 157 Wn. 2d 1006, 136 P.3d 759 (2005) (Domestic violence victim's explanation to an emergency room physician of how her jaw was injured was not testimonial because the "purpose of [the physician's] examination was for medical diagnosis and treatment of [the victim's] significant injuries. [The physician] had no role in the investigation of the assault and he was not working on behalf of or in conjunction with the police or governmental officials to develop testimony for the prosecution."), review denied, 157 Wn. 2d 1006, 136 P.3d 759 (2006).

One key inquiry is whether the examination and questioning were for a "diagnostic purpose" and whether the "statement was the by-product of substantive medical activity." In re T.T., supra, 351 Ill. App. 3d 992; Id., 993 (pediatrician's "primary investment in cooperating with law enforcement agencies was in facilitating the least traumatic method of diagnosis and treatment for the alleged victim, rather than a specific interest in enforcing sexual abuse laws").

Courts have struggled with whether the focus should be on the perspective and motivation of the questioner, or on the perspective and motivation of the declarant. A few courts have focused on the declarant's perspective as the dispositive factor. See, United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004), cert. denied, 543 U.S. 1079, 125 S. Ct. 938, 160 L.Ed.2d 821 (2005) (statements made to confidential informant); United States v. Saget, 377 F.3d 223, 228-29 (2d Cir. 2004)(statements to

undercover officers). Others have focused on the perspective and motivation of the government questioner, and given no weight to the perspective of the declarant. See, United States v. Bordeaux, 400 F. 3d 548, 556 (8th Cir. 2005)(law enforcement interview of young child); People ex. rel. R.A.S., 111 P.3d 487, 488 (Colo. Ct. App. 2004) (law enforcement interview of young child).

Since the Supreme Court's decision in Davis v. Washington, it is clear that a court should be examining and weighing the perspective and motivation of both declarant and questioner. Davis v. Washington, ___ U.S. ___, 126 S. Ct. 2266, 165 L.Ed.2d 224 (2006).

In that case the court held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 126 S. Ct. at 2274 (2006). The court went on to state that "even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." Id. Davis instructs that the courts are to objectively examine the circumstances surrounding the interrogation to determine whether the primary, if not the sole, purpose of

the interrogation was to investigate a possible crime. If so, then the statements produced by the interrogation will be testimonial. However, if there is another primary purpose, such as interrogation to determine the need for emergency assistance, then the statements will be non-testimonial.

Application of these principles is difficult because, as one court pointed out, "[o]ften government questioners and declarants will have multiple purposes." State v. Bobadilla, 709 N.W. 2d 243, 252 (Minn. 2006). In Bobadilla, the Minnesota Supreme Court held that statements made by a young child in a risk assessment interview conducted by a child –protection worker were nontestimonial. The court reasoned:

> Here, the interview of T.B. was initiated by a child-protection worker in response to a report of sexual abuse for the overriding purpose of assessing whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child. In the interview, the child-protection worker established rapport with T.B., identified the child's terms for human anatomy, made a touch and abuse inquiry, and closed the interview. If part of the purpose of this interview was to produce a statement for use at a future trial, such a purpose was at best incidental to the main purpose: assessing and responding to imminent risks to T.B.'s health and welfare. Much like the at-the-scene police questioning in Wright, the interview of T.B. "represents a response to a call for assistance and preliminary determination of 'what happened' and whether there was immediate danger, rather than an effort to gather evidence for a future trial." 701 N.W.2d at 813-14. Moreover, given T.B.'s very young age, it is doubtful that he was even capable of understanding that his statements would be used at a trial.

State v. Bobadilla, 709 N.W.2d at 255.

In the case now before the court, the record shows that on October 19, 1999, K.G. went to a county health department for a pregnancy test which was administered by a registered nurse. RP 262-267. In the course of that appointment, K.G. told the nurse that "her biological father was the father of the baby." RP 269. This was not in response to any question asked by the nurse. RP 269, 281. Lora Gribben was there, and asked the nurse to contact child services in Tacoma with this information; the nurse telephoned Ms. Lapointe, who asked the nurse to ask K.G some specific questions, including where the act took place, and whether it was consensual, then relay her answers back by fax. RP 270, 283.

The record also indicates that this initial visit is not the only time that K.G relayed the information regarding how she got pregnant to the employees of the health department. Nurse McMahan testified that the Health department saw two types of patients: "general patients" who might come in for a specific service such as a pregnancy test, and "total care patients" who are receiving ongoing health care such as a family planning appointment. RP 265-268. For the second type of patient, the staff would get a full medical history, but not for the first type. RP 268. K.G.'s was a "general patient" for her first visit, but returned for four more visits as a "total care patient" for prenatal care. RP 268. Nurse McMahan testified that for a total care patient, it would be important to know the identity of the father of the baby so there could be an understanding of the

patient's support system and whether there are any emotional issues that might impact the pregnancy. RP 269. Nurse McMahan testified that K.G.'s records showed that when she came back to participate in the Maternity Care Coordination program, the nurse who did her initial intake documented that K.G. related that her biological father was the father of the baby, and that he had raped her. RP 274-276. Nurse McMahan indicated that there are several notations in K.G's records about who the baby's father was, and that she was consistent in her disclosures. RP 273-277.

This record demonstrates that the initial disclosure, and the later disclosure, were primarily made for the purpose of medical treatment and diagnosis rather than for future prosecution. There were no police officers present during K.G's visits to the Health Department, and K.G.'s initial disclosure was volunteered. Defendant argues that Ms Lapointe actions turned the interview in to a police interrogation. The record does not support this conclusion. Ms. Lapointe worked for tribal child protective services and testified that she had nothing to do with criminal prosecutions. RP 522-527. She may have wanted this information to complete the information in her own records, initiate a future dependency action, or she may have been concerned about whether defendant posed a risk to other children that were still within her jurisdiction. RP 402. The record indicates that Detective Goetz was not even aware of any allegations involving K.G. at the time she made the initial statement to

Nurse McMahan on October 19, 1999. RP 400-402. Thus, the record is not clear that Ms. Lapointe'S desire for information was linked to a criminal prosecution. Any deficiencies in the record on this point must be held against the defendant, because had a confrontation issue been raised in the trial court, the record would have been better developed. As such he cannot demonstrate conclusively that the statements to the Davey County Health Department nursing staff were testimonial from the record below. This means that he has failed to demonstrate manifest constitutional error that may be raised for the first time on appeal.

2. UNDER STATE V. PILLATOS, DEFENDANT'S EXCEPTIONAL SENTENCE IS PROPER WHEN HIS TRIAL BEGAN AFTER THE LEGISLATURE AMENDED THE SRA TO COMPLY WITH THE PROVISIONS OF BLAKELY AND DEFENDANT WAS SENTENCED UNDER RCW 9.94A.537.

a. Defendant's claims regarding the retroactivity of 2005 amendments to the SRA, due process violations and the violation of the separation of powers doctrine are resolved by the Supreme Court decision in State v. Pillatos.

In 2005, the Legislature passed laws amending the SRA which were designed to "create a new criminal procedure for imposing greater punishment than the standard range" in an effort to "restore the judicial

discretion that has been limited as a result of the Blakely[5] decision." Laws of 2005, c. 68, §1. The amendments took effect on April 15, 2005, and were codified as RCW 9.94A.537. Id., see also RCW 9.94A.537. Defendant argues against retroactive application of RCW 9.94A.537.

However, in the recent case of State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007), the Washington Supreme Court held that the amendments to the SRA in response to Blakely, "applies to all cases where trials have not begun or where pleas have not been accepted" at the time of its enactment. The court held that, because the amendments were procedural in nature, they did not increase the amount of punishment a defendant faced and could therefore be applied retroactively. Id. The court also held that the amendments were constitutional, as they did not violate due process, ex post facto provisions, or chill the right to a trial. Id. Since the Pillatos court found that the Legislature authorized the application of the new procedures to cases pending a determination of guilt at the time of its effective date, a trial court is authorized to utilize the new procedures without violating the separation of powers doctrine.

RCW 9.94A.537(1) requires that "prior to trial or entry of guilty plea... the state may give notice that it is seeking a sentence above the standard sentencing range" and that the notice "shall state aggravating circumstances upon which the requested sentence will be based." Under

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[5] Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 1868, 159 L.Ed.2d 403 (2004).

RCW 9.94A.535:

> The court may impose a sentence outside the standard sentence range for an offense if it finds . . . that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.
>
> . . .
>
> (3) Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.
>
> . . .
>
> (n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.
>
> . . .

The State gave defendant notice of its intention to seek a sentence above the standard range pursuant to RCW 9.94A.535, alleging in the second amended information that the current offenses were aggravated by an abuse of trust under RCW 9.94A.535(3)(n). CP 41-43; Appendix A. Defendant was given proper notice as required pursuant to RCW 9.94A.537.

Secondly, RCW 9.94A.537(2) requires:

> The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and

> by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

Here, the jury was given special verdict forms and instructed that if it found defendant guilty, that it was to answer the question in the special verdict forms; it was further instructed that it had to be unanimously satisfied beyond a reasonable doubt to answer the question "yes." CP 86-105 (Jury Instruction 18). The special verdict forms asked the jury the following question:

> Did the defendant abuse a position of trust to facilitate the commission of the crime of Incest in the First Degree, as charged in Count III [or IV]?
>
> ANSWER: _____ (Yes or No).

CP 109-111. The jury returned special verdicts on Counts III and IV answering this question "Yes." Id. Based upon this finding, the court imposed an exceptional sentence by running the sentences on Count III and Count IV consecutively, rather than concurrently. CP 137-150, 177-179. The court's action complied with both the statutory provisions and constitutional requirements.

The Washington Supreme Court held that the exceptional sentence provisions of the SRA are not facially unconstitutional in the wake of Blakely. State v. Hughes, 154 Wn.2d 118, 126, 110 P.3d 192 (2005). Because the exceptional sentence provisions were still constitutional,

defendant's due process rights were not violated as he would have had notice that he could still receive an exceptional sentence if, under the provisions of Blakely, a jury found aggravating factors beyond a reasonable doubt. This is exactly the procedure the court followed in this case.

b. Defendant has failed to show the existence of an equal protection claim or the infringement on his right to trial.

The equal protection clauses of the Fourteenth Amendment and Washington Const. art. 1, § 12 require that "'persons similarly situated with respect to the legitimate purpose of the law receive like treatment.'" State v. Phelan, 100 Wn.2d 508, 512, 671 P.2d 1212 (1983). Someone who believes that he has been disadvantaged by a legislative enactment that treats similarly situated persons differently may challenge that law on equal protection grounds. Traditionally, two tests have been used to determine whether this right to equal treatment has been violated. Under the rational relationship test, a law is subjected to minimal scrutiny and will be upheld "'unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective.'" Phelan, at 512. Under the strict scrutiny test, a law may be upheld only if it is shown to be necessary to accomplish a compelling state interest. State v. Rice, 98 Wn.2d 384, 399, 655 P.2d 1145 (1982). The strict scrutiny test is used if an allegedly discriminatory statutory classification affects a suspect class or a

fundamental right. Phelan, at 512; Rice, at 399. Both the United States Supreme Court and this court have recognized a third test to apply in limited circumstances. Under the "intermediate scrutiny" test, the challenged law must be seen as furthering a substantial interest of the state. Phelan, at 512. The Supreme Court typically applies this test where gender-based classifications are at issue. Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41, 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985).

As far as the State is aware, a court will only consider an equal protection claim when the challenge is based upon a statute or law as enacted by the legislature. The State is unaware of any case, and none are cited in appellant's brief, where the court has analyzed a statute on equal protection grounds while taking into consideration an overlay of recent case law which affects how the statute is implemented. None of the tests used to assess equal protection claims are appropriate in such circumstances, for each looks just to the legislative goals with no consideration of how those goals may have been affected or impacted by recent judicial decisions. Defendant does not challenge any statute as enacted or argue how it creates two classes out of similarly situated persons. Defendant has failed to show that an equal protection claim is cognizable under the circumstances presented here.

Additionally, defendant has not clearly identified the nature of his class. He describes his class as "that class of people whose cases ***arose*** in the short window of time after Blakely and before the effective date of the

Blakely fix statute." Brief of Appellant at p. 23 (emphasis added). Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), issued on June 24, 2004. As noted above, the Blakely fix went into effect on April 15, 2005. Laws of 2005, c. 68, §1. The underlying acts supporting defendant's convictions for incest in the first degree occurred in 1999, long before the decision in Blakely. CP 1-3, 86-105. The State filed an information charging defendant with these crimes on December 9, 2003, which was prior to the decision in Blakely. CP 1-3. Defendant's case finally started trial on May 31, 2005, after the Blakely fix went into effect. RP 25. The State is unclear as to how this case "***arose***" in the "short window of time after Blakely and before the effective date of the Blakely fix statute." "A defendant is subject to the penalty in place the day the crime was committed." Pillatos, 159 Wn. 2d at 475. When defendant committed his crimes, the statutory scheme in effect put him on notice that he could be subject to an exceptional sentence up to 120 months on each count; when he went to trial the statutory scheme put him on notice that he could be subject to the same exceptional sentence. See, Pillatos, 159 Wn.2d at 475-476. As defendant fails to show that he is a member of a class that is being treated disparately, he has failed to articulate a cognizable equal protection claim.

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the judgment and sentence entered below.

DATED: May 22, 2007.

GERALD A. HORNE
Pierce County
Prosecuting Attorney

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5-22-07
Date Signature

APPENDIX "A"

Amended Information

03-1-05739-0 23124480 AMINF2 05-31-05

FILED
IN COUNTY CLERK'S OFFICE
A.M. MAY 27 2005 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. FRANK CHESTER EARL, Defendant.	CAUSE NO. 03-1-05739-0 2nd AMENDED INFORMATION

DOB: 7/17/1952 SEX : MALE RACE: AMER INDIAN/ALASKAN
PCN#: SID#: 13427773 DOL#: UNKNOWN

COUNT I

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse FRANK CHESTER EARL of the crime of RAPE OF A CHILD IN THE THIRD DEGREE, committed as follows:

That FRANK CHESTER EARL, in the State of Washington, during the period between the 1st day of June, 1999 and the 4th day of August, 1999, did unlawfully and feloniously, being at least 48 months older than A.G., engage in sexual intercourse with A.G., who is at least 14 years old but less than 16 years old and not married to the defendant, contrary to RCW 9A.44.079, and against the peace and dignity of the State of Washington, and further that there are substantial and compelling aggravating circumstances in this case which will justify an exceptional sentence beyond the standard range, to wit: the defendant's conduct during the commission of this offense manifested AN ABUSE OF TRUST, whereby defendant abused a position of trust to perpetrate the offense, RCW 9.94A.535(2)(d)(iv) (now codified at RCW 9.94A.535(3)(n)).

COUNT II

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse FRANK CHESTER EARL of the crime of RAPE OF A CHILD IN THE THIRD DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,

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and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That FRANK CHESTER EARL, in the State of Washington, during the period between the 1st day of June, 1999 and the 4th day of August, 1999, did unlawfully and feloniously, being at least 48 months older than A.G., engage in sexual intercourse with A.G., who is at least 14 years old but less than 16 years old and not married to the defendant, contrary to RCW 9A.44.079, and against the peace and dignity of the State of Washington, and further that there are substantial and compelling aggravating circumstances in this case which will justify an exceptional sentence beyond the standard range, to wit: the defendant's conduct during the commission of this offense manifested AN ABUSE OF TRUST, whereby defendant abused a position of trust to perpetrate the offense, RCW 9.94A.535(2)(d)(iv) (now codified at RCW 9.94A.535(3)(n)).

COUNT III

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse FRANK CHESTER EARL of the crime of INCEST IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That FRANK CHESTER EARL, in the State of Washington, during the period between the 1st day of June, 1999 and the 4th day of August, 1999, did unlawfully and feloniously engage in sexual intercourse with A.G., who was known by him to be related to him, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of the whole or half blood, contrary to RCW 9A.64.020(1), and against the peace and dignity of the State of Washington, and further that there are substantial and compelling aggravating circumstances in this case which will justify an exceptional sentence beyond the standard range, to wit: the defendant's conduct during the commission of this offense manifested AN ABUSE OF TRUST, whereby defendant abused a position of trust to perpetrate the offense, RCW 9.94A.535(2)(d)(iv) (now codified at RCW 9.94A.535(3)(n)).

COUNT IV

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse FRANK CHESTER EARL of the crime of INCEST IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

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That FRANK CHESTER EARL, in the State of Washington, during the period between the 1st day of May, 1999 and the 30th day of September, 1999, did unlawfully and feloniously engage in sexual intercourse with K.G., who was known by him to be related to him, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of the whole or half blood, contrary to RCW 9A.64.020(1), and against the peace and dignity of the State of Washington, and further that there are substantial and compelling aggravating circumstances in this case which will justify an exceptional sentence beyond the standard range, to wit: the defendant's conduct during the commission of this offense manifested AN ABUSE OF TRUST, whereby defendant abused a position of trust to perpetrate the offense, RCW 9.94A.535(2)(d)(iv) (now codified at RCW 9.94A.535(3)(n)).

DATED this 26th day of May, 2005.

TACOMA POLICE DEPARTMENT
WA02703

pjh

GERALD A. HORNE
Pierce County Prosecuting Attorney

By: _____
PATRICK HAMMOND
Deputy Prosecuting Attorney
WSB#: 23090

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